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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 262.

WILLIAM J. B. MYRES, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

The Government's Brief in Opposition inadvertently misstates the Questions Presented. However, aside from arguing the question of the sufficiency of the evidence—not urged—and ignoring the question of conflict with the *Spies* case, the brief strongly emphasizes the general importance of the question as to the power of revenue agents, without summons or subpoena and over objection, upon mere simple demand and at will, to enter and examine a taxpayer's books and records.

I.

The Court's Summarization of the Evidence to the Jury Was Erroneous.

Petitioner has never essayed to point out all the errors occurring during the trial. Consequently, in the petition no criticism was leveled directly at the court's statement as to which the Government makes the point that it has not been challenged (Br. in Opp., p. 7). Limitation of space required omission of specific challenge. However, since the point is raised, it may well be noted that the inaccuracy of the Court's statement is plain from the analysis of the evidence set out in the petition, p. 12, note 5.

II.

Conflict With Decision of This Court in The Spies Case.

As a second Reason for Granting the Writ, the petition points out conflict with the decision of this court in *Spies* v. *United States*, 317 U. S. 492 (Pet. 23-26).

Specification of error to be urged No. 3 (Pet. 9) and the second Question Presented (Pet. 2) are based on the holding of this Court in that case.

The Government has ignored this point entirely.

III.

Refusal of Mere Informal Demand, in The Absence of a Summons for Records and Books is Not a Misdemeanor.

Petitioner's first reason for granting the writ makes the point that no mere informal demand for access to books and records imposes on the taxpayer a duty to open them to inspection by a revenue agent, and that it was prejudicial error for the trial court so to instruct the jury (Pet. 15-23).

The Government's argument contra appears in its Brief in Opposition, pp. 10-13.

The duty can be created only by the administrative summons of the Commissioner, contemplated by I. R. C.,

§ 3633(a), or of the Comptroller, contemplated by I. R. C. § 3615. Disobedience of the Comptroller's summons subjects the taxpayer to contempt proceedings under § 3615(e) and disobedience to the Commissioner's summons subjects him to penalty by subpoena and subsequent contempt proceedings under § 3633(a) (Pet. 15-23). Disobedience of either type of summons also subjects the taxpayer to indictment for misdemeanor (Pet. 22).

But there must first be at least a summons (Pet. 19). So in the *Murdock* case, the indictment, under what is now I. R. C., § 145(a), was for failure to give testimony and supply information after being "summoned". *United States* v. *Murdock*, 284 U. S. 141, 146; 290 U. S. 389, 393. Mr. Justice Butler's statement that the "offense is complete at the time of such failure to answer" (*United States* v. *Murdock*, 284 U. S. 141, 148) must be read in the light of facts of that case as necessarily assuming the condition precedent of an initial requirement of attendance by summons.

The Government's contention exemplifies the process of erosion of constitutional rights by a series of minor encroachments. For the Government now adopts in this Court the instruction of the trial court and boldly asserts that under I. R. C., § 145(a) petitioner's failure to comply with the mere informal request for substantiating records constituted a misdemeanor (Br. in Opp., p. 12). The Government quotes and relies on *obiter* from the opinion in *Nicola* v. *United States*, 72 F. 2d 780, 784 (C. C. A. 3, 1934) (Br. in Opp., p. 12, n. 8). But that language must be read in connection with the Government's statement of the law in its own brief in that case in that court (pp. 24-25):

> "The mechanics of the investigation and the ultimate production of this evidence, indicate a further waiver by failure to object at the proper state of the proceedings. * * *
>
> "*Defendant could have denied the revenue agent access to his books.* The revenue agent could then, under section 618 [I. R. C., sec. 3614], require the at-

tendance of Mr. Nicola with his books and records. The latter could appear before the agent and refuse to divulge the requested information and refuse to show the books and papers. The agent, under Section 617, of the same act (*supra*, p. 3) [I. R. C., sec. 3633], would then apply to this Court, through petition by the United States Attorney, for an order on Mr. Nicola (or a rule to show cause) requiring the latter to make the necessary disclosures. A hearing could be had on such rule or order, and the Court would then decide whether or not the objection was contumacious. If the decision was in favor of the Government, the defendant would have to give the desired data, saving his rights by proper objection and exception. If the decision was in favor of Mr. Nicola, the inquiry would end. Thus, again, the defendant waived the constitutional privilege." (Emphasis supplied)

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[p. 27]

"Appellant's argument that Nicola could have been indicted for refusing to divulge the contents of his records, and, therefore, did so under compulsion (brief, p. 51), is without force. He could have refused on the ground of self-incrimination, as above pointed out (p. 23). The agent would then have to issue a subpoena. Appearance under it and refusal to answer would mean application to Court for a compulsory order, as in the Sullivan case, discussed above."

Thus, it appears that the Government in the *Nicola* case agreed with the petitioner's contention that the taxpayer may always properly refuse an informal demand for access and under I. R. C., § 3614 require a formal summons to attend with books and records.

Important here is the indicated willingness of the Solicitor General to further breach the right of privacy on the basis of the instant case and his broad interpretation of the dicta of the *Nicola* case.

The Government also seeks to minimize the prejudice of the error by referring to other testimony of revenue agents that petitioner in interviews told them there were not in

existence the checks, check stubs and files he later produced at the trial and it concludes that, therefore, peitioner's argument "is flatly contradicted by the record" (Br. in Opp., pp. 12-13).

Overlooked and omitted in the Government's brief is the violent conflict in the evidence on this point. Defendant testified that the agents never asked him for the case files, cancelled checks or check stubs (R. 916-917). The written transcript of the only meeting between the taxpayer and the agents of which written record was made, significantly omits any such request (R. 919-941). See Petition, p. 16, n. 8.

On the other hand, the erroneous instruction as to the law was based on petitioner's failure to comply with a letter demand for transmission of substantiating records (R. 1144, 1146). Because petitioner admitted that such data were in his case files, and because he admitted such refusal to comply (R. 1146-47), the prejudice from erroneous instruction that he was under legal duty to comply is clear.

Plainly the prejudice of the erroneous instruction based on uncontradicted evidence is not lightly to be dissipated by speculation as to the credibility which may or may not have been attached by the jury to contradicted testimony as to misrepresentation in the course of other interviews and inquiries.

IV.

Prejudice of Erroneous Instruction that 50-50 Arrangement Creates Presumption in Law of the Equal Sharing of Expenses Was Not Eliminated by Submitting the Matter on the Evidence.

Petitioner's Point 4(b) (Pet. 40-43) demonstrates the error in the instruction to the jury that there was a presumption in law that petitioner was not required to bear more than 50% of expenses.

The Government (Br. in Opp., pp. 18-20) does not question the error; it asserts that it was obviated by submitting

the issue to the jury for determination on "the evidence". But this misses the point. By the erroneous instruction, the fact of the 50-50 arrangement was given artificial probative weight as part of all the evidence, pro and con, considered by the jury.

It is, of course, no answer at all to say, as does the Solicitor General (Br. in Opp., pp. 19-20): "We believe the jury would have reached the same result had the court referred to a 'permissible inference' instead of a 'presumption of law'."

The question is not one for speculation whether the jury would reach the same result under proper instruction, but "whether guilt has been found by a jury according to the procedure and standard appropriate for criminal trials in the federal courts". *Bollenbach* v. *United States*, 326 U. S. 607, 614.

It is respectfully submitted that writ of certiorari should issue.

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